

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TAMARA L. WADE,)	
)	No. CV-09-0215-CI
Plaintiff,)	
)	ORDER DENYING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND GRANTING DEFENDANT'S
MICHAEL J. ASTRUE, Commissioner)	MOTION FOR SUMMARY JUDGMENT
of Social Security,)	
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 16.) Attorney Maureen R. Rosette represents Tamara Wade (Plaintiff); Special Assistant United States Attorney Michael Howard represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 8.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

Plaintiff protectively filed for Supplemental Security Income (SSI) on December 20, 2006. (Tr. 86.) She alleged disability due to bipolar disorder, scoliosis and a hearing impairment, with an onset date of October 1, 2000. (Tr. 90.) Benefits were denied initially and on reconsideration. On August 17, 2007, Plaintiff

1 timely requested a hearing before an administrative law judge (ALJ),
2 which was held before ALJ R.S. Chester on October 7, 2008. (Tr. 16,
3 28-53.) Plaintiff, who was represented by counsel, and vocational
4 expert Deborah LaPoint (VE) testified. The ALJ denied benefits on
5 November 5, 2008, and the Appeals Council denied review. (Tr. 1-5,
6 16-27.) The instant matter is before this court pursuant to 42
7 U.S.C. § 405(g).

8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
10 court set out the standard of review:

11 A district court's order upholding the Commissioner's
12 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
13 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
14 Commissioner may be reversed only if it is not supported
15 by substantial evidence or if it is based on legal error.
16 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
17 Substantial evidence is defined as being more than a mere
18 scintilla, but less than a preponderance. *Id.* at 1098.
19 Put another way, substantial evidence is such relevant
20 evidence as a reasonable mind might accept as adequate to
21 support a conclusion. *Richardson v. Perales*, 402 U.S.
22 389, 401 (1971). If the evidence is susceptible to more
23 than one rational interpretation, the court may not
24 substitute its judgment for that of the Commissioner.
25 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
26 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

27 The ALJ is responsible for determining credibility,
28 resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
supports more than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner. *Tackett*, 180

1 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
2 Nevertheless, a decision supported by substantial evidence will
3 still be set aside if the proper legal standards were not applied in
4 weighing the evidence and making the decision. *Browner v. Secretary*
5 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
6 there is substantial evidence to support the administrative
7 findings, or if there is conflicting evidence that will support a
8 finding of either disability or non-disability, the finding of the
9 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
10 1230 (9th Cir. 1987).

11 SEQUENTIAL EVALUATION

12 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
13 requirements necessary to establish disability:

14 Under the Social Security Act, individuals who are
15 "under a disability" are eligible to receive benefits. 42
16 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
17 medically determinable physical or mental impairment"
18 which prevents one from engaging "in any substantial
19 gainful activity" and is expected to result in death or
20 last "for a continuous period of not less than 12 months."
21 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
22 from "anatomical, physiological, or psychological
23 abnormalities which are demonstrable by medically
24 acceptable clinical and laboratory diagnostic techniques."
25 42 U.S.C. § 423(d)(3). The Act also provides that a
26 claimant will be eligible for benefits only if his
27 impairments "are of such severity that he is not only
28 unable to do his previous work but cannot, considering his
age, education and work experience, engage in any other
kind of substantial gainful work which exists in the
national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
the definition of disability consists of both medical and
vocational components.

In evaluating whether a claimant suffers from a
disability, an ALJ must apply a five-step sequential
inquiry addressing both components of the definition,
until a question is answered affirmatively or negatively
in such a way that an ultimate determination can be made.
20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
claimant bears the burden of proving that [s]he is

1 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
2 1999). This requires the presentation of "complete and
3 detailed objective medical reports of h[is] condition from
4 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
5 404.1512(a)-(b), 404.1513(d)).

6 The Commissioner has established a five-step sequential
7 evaluation process for determining whether a person is disabled. 20
8 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
9 137, 140-42 (1987). In steps one through four, the burden of proof
10 rests upon the claimant to establish a prima facie case of
11 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
12 920, 921 (9th Cir. 1971). This burden is met once a claimant
13 establishes that a physical or mental impairment prevents her from
14 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a),
15 416.920(a). At step five, the burden shifts to the Commissioner to
16 show that (1) the claimant can perform other substantial gainful
17 activity; and (2) a "significant number of jobs exist in the
18 national economy" which claimant can perform. 20 C.F.R. §§
19 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
20 1498 (9th Cir. 1984).

21 STATEMENT OF THE CASE

22 The facts of the case are set forth in detail in the transcript
23 of proceedings and are briefly summarized here. At the time of the
24 hearing, Plaintiff was 42 years old, unmarried, and living with her
25 16 year daughter and 13 year old son in a two-story single dwelling
26 house. (Tr. 33, 36.) Plaintiff testified her son is a special
27 needs child with intestinal problems. She indicated recent surgery
28 has improved her son's condition. (Tr. 35.) She stated she helps
him with homework and works with the school to address his needs.

1 (Tr. 34-36.) Plaintiff testified she has a high school diploma and
2 past work experience as a cook and bartender. She stated she quit
3 her last job as a bartender because she became overwhelmed and cried
4 all the time, and her scoliosis kept her from working. She
5 indicated she received unemployment for about six months. (Tr. 37-
6 39.) Plaintiff testified she could stand for one half hour, had
7 left hand cramps and left arm numbness; she could carry ten pounds,
8 walk three to five blocks, and sit for an hour. (Tr. 40-42, 45.)
9 She said she no longer does many outside activities, and gets
10 overwhelmed and starts crying when doing household chores. (Tr.
11 42.) However, she reported she has five grandchildren who live in
12 town, and she takes care of a one month old grandchild once a week.
13 (Tr. 44.) She testified she cannot work because of depression,
14 anxiety and scoliosis. (Tr. 37, 39.)

15 ADMINISTRATIVE DECISION

16 At step one, ALJ Chester found Plaintiff had not engaged in
17 substantial gainful activity since the alleged onset date. (Tr.
18 18.) At step two, he found Plaintiff had severe impairments of
19 bipolar disorder and anxiety. (*Id.*) Noting that medical records
20 from treating physicians did not reflect complaints of or treatment
21 for back pain, the ALJ found scoliosis imposed minimal limitations
22 on Plaintiff's ability to perform work-related activities and was,
23 therefore, a non-severe impairment. He also found her hearing
24 impairment was non-severe. (Tr. 22.) At step three, he found
25 Plaintiff's impairments, alone and in combination, did not meet or
26 medically equal one of the listed impairments in 20 C.F.R., Appendix
27 1, Subpart P, Regulations No. 4 (Listings). (*Id.*) The ALJ
28

1 summarized Plaintiff's testimony and concluded her statements
2 regarding the severity of her functional limitations were not fully
3 credible. (Tr. 23-24.) At step four, he determined she had the
4 residual functional capacity (RFC) to perform medium work, but she
5 could not work in a noisy environment and should avoid noisy
6 machinery and heights due to her impaired hearing. He determined her
7 work should require only superficial contact with the public and co-
8 workers. (Tr. 23.) Based on this RFC and VE testimony, the ALJ
9 concluded Plaintiff could perform her past work as a short order
10 cook. Finding that it was uncertain her past work rose to the level
11 of substantial gainful activity, the ALJ proceeded to step five and
12 found Plaintiff's non-exertional limitations would not significantly
13 erode the occupational base of unskilled, medium level work. (Tr.
14 26.) Referencing the Medical-Vocational Guidelines, 20 C.F.R. Part
15 404, Subpart P, Appendix 2, he concluded Plaintiff was not disabled,
16 as defined by the Social Security Act, at any time from December 20,
17 2006, through the date of his decision. (*Id.*)

18 **ISSUES**

19 The question is whether the ALJ's decision is supported by
20 substantial evidence and free of legal error. Plaintiff argues the
21 ALJ erred when he rejected the opinions of examining psychologist
22 Dennis Pollack, Ph.D., in favor of the opinions of Joyce Everhart,
23 Ph.D.; improperly disregarded limitations assessed by non-examining
24 psychologist James Bailey, Ph.D.; and failed to include mental
25 limitations supported by the record in the final RFC determination.
26 (Ct. Rec. 14 at 10-13.)

A. Medical Source Opinions

State agency psychologists are treated as expert non-examining sources in disability proceedings. The ALJ may not ignore these opinions and must explain the weight given. *SSR 96-6p*. The opinion of a non-examining medical expert or state agency consultant by itself cannot be considered substantial evidence that supports the rejection of a treating or examining physician. *Lester*, 81 F.3d at

1 831. However, the opinions of non-examining reviewing psychologists
2 may serve as substantial evidence when supported by and consistent
3 with other evidence in the record. *Andrews*, 53 F.3d at 1041.

4 Historically, the courts have recognized conflicting medical
5 evidence, the absence of regular medical treatment during the
6 alleged period of disability, and the lack of medical support for
7 doctors' reports based substantially on a claimant's subjective
8 complaints of pain as "specific," "legitimate" reasons for
9 disregarding a treating or examining physician's opinion. *Flaten v.*
10 *Secretary of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir.
11 1995); *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). Medical
12 opinions based on a claimant's subjective complaints may be rejected
13 where the claimant's credibility has been properly discounted.¹

14 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). The
15 claimant's credibility is also an appropriate factor weighed in the
16 evaluation. *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).
17 Where an ALJ determines a treating or examining physician's stated
18 opinion is materially inconsistent with the physician's own
19 treatment notes, legitimate grounds exist for considering the

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21 ¹ The ALJ's credibility findings are specific, "clear and
22 convincing" and unchallenged. (Tr. 24.) He properly noted
23 instances of inconsistency between Plaintiff's statements to medical
24 providers and her testimony, her failure to take effective
25 medication consistently, and the lack of medical evidence to support
26 allegations of physical limitations. (*Id.*) These are proper reasons
27 supported by substantial evidence. *See, e.g., Flatten*, 44 F.3d at
28 1463-64.

1 purpose for which the doctor's report was obtained and for rejecting
2 the inconsistent, unsupported opinion. *Nguyen v. Chater*, 100 F.3d
3 1462, 1464 (9th Cir. 1996). Rejection of an examining medical source
4 opinion is specific and legitimate where the medical source's
5 opinion is not supported by his own medical records and/or objective
6 data. *Tommasetti v. Astrue*, 533 F.3d 1035 (9th Cir. 2008).

7 Dr. Pollack evaluated Plaintiff in September 2008; he
8 administered objective tests for intelligence (WAIS), personality
9 (MMPI-2), an obsessive compulsive inventory, and neuropsychological
10 and malingering tests. His narrative report describes test results
11 indicating average intelligence; possible overstatement of
12 difficulties; mild to moderate range of obsession/compulsion; and
13 normal range in the neuropsychological and malingering tests. (Tr.
14 262-64.) His Axis III diagnoses were based on Plaintiff's self-
15 report of bipolar disorder, anxiety, hearing loss, depression, panic
16 attacks, asthma, chronic acid esophagus, dyslipidemia, hearing lost
17 and abnormal weight gain. (Tr. 264.) He assigned a global
18 assessment of functioning (GAF) score of 60 (moderate).

19 The ALJ noted "[t]he body of Dr. Pollack's report indicates
20 questionable validity scales on the MMPI-2" and inconsistencies
21 between Plaintiff's self-report and assessed limitations. He also
22 cited the GAF score as inconsistent with the moderate and marked
23 limitations in pace and performance.² (Tr. 25.) These are specific
24

25 ² The Global Assessment of Functioning (GAF) scale is a common
26 tool used by psychologists for tracking and evaluating the overall
27 psychological functioning of a patient. A score of 51-60 indicates
28

1 legitimate reasons to reject Dr. Pollack's medical opinion.
2 Further, the evidence of overstatement of symptoms detracts from the
3 validity of test results. It also is noted on review Plaintiff's
4 report to Dr. Pollack that she quit her bartender job because the
5 business closed is inconsistent with her statement to the ALJ that
6 she quit because of depression and uncontrollable crying. (Tr. 24,
7 38, 260.) This evidence of unreliable self-report is a legitimate
8 reason to reject a medical opinion based on the claimant's symptom
9 complaints. *Tonapetyan*, 242 F.3d at 1149. The ALJ's reasoning that
10 Dr. Pollack's opinion is frequently sought by claimant's counsel
11 because he consistently finds this marked limitation is erroneous

12 "moderate symptoms (e.g., flat affect and circumstantial speech,
13 occasional panic attacks) OR moderate difficulty in social,
14 occupational, or school functioning (e.g., no friends, unable to
15 keep a job.)" A score of 61-70 indicates "some mild symptoms,
16 (e.g., depressed mood and mild insomnia) OR some difficulty in
17 social, occupational, or school functioning (e.g., occasional
18 truancy, or theft within the household), but generally functioning
19 pretty well, has some meaningful interpersonal relationships." *DSM-*
20 *IV*, at 32. Although the Commissioner does not use the GAF score as
21 an indicator of disability, it is noted on review that this moderate
22 score assessed in Dr. Pollack's narrative report is significantly
23 inconsistent with the single marked limitation in sustained
24 concentration and persistence noted in his Medical Source Statement.
25 (Tr. 266.) The ALJ properly identified this unexplained
26 inconsistency as a reason for rejecting the marked limitation. (Tr.
27 25.)
28

1 and unsupported by substantial evidence. *Lester*, 81 F.3d at 832.
2 However, where, as here, the Commissioner has provided other
3 specific, legitimate reasons, the error is harmless. *Carmickle*, 533
4 F.3d at 1164.

5 The ALJ did not err in giving more weight to Dr. Everhart's
6 evaluation, which was also based in part on objective test results
7 and a review of the medical records. The ALJ summarized Dr.
8 Everhart's and Dr. Pollack's evaluations (Tr. 19-20, 21), properly
9 explained the weight given each report, and rejected Dr. Pollack's
10 conclusory opinions with specific and legitimate reasons. As found
11 by the ALJ, Dr. Everhart's opinions are "consistent with the
12 longitudinal record." (Tr. 25, 172-76.) The resolution of
13 conflicts in medical evidence is the responsibility of the ALJ, not
14 the reviewing court. Where, as here, there is evidence to support
15 both Plaintiff's and the Commissioner's interpretation of the
16 evidence, under the case law the court cannot substitute its
17 judgment for that of the Commissioner. Because the ALJ's reasoning
18 is supported by substantial evidence, his findings may not be
19 disturbed.

20 **B. RFC Determination**

21 The RFC determination represents the most a claimant can still
22 do despite his or her physical and mental limitations. 20 C.F.R. §
23 416.945. The RFC assessment is not a "medical issue" under the
24 Regulations; it is an administrative finding based on all relevant
25 evidence in the record, not just medical evidence. *Id.* The final
26 determination regarding a claimant's ability to perform basic work
27 is the sole responsibility of the Commissioner. 20 C.F.R. §
28

1 416.946; SSR 96-5p. No special significance may be given to a
2 medical source opinion on issues reserved to the Commissioner. 20
3 C.F.R. § 416.927(e).

4 ALJ Chester's RFC determination reflects a reasonable
5 interpretation of the medical evidence in its entirety, as well as
6 Plaintiff's credible testimony. As discussed above, the ALJ
7 properly rejected the single marked limitation assessed by Dr.
8 Pollack in his summary conclusions because it was inconsistent with
9 his narrative findings and the longitudinal record and, therefore,
10 the ALJ relied on Dr. Pollack's narrative report findings. In
11 addition, it is noted on review that Dr. Pollack found "no
12 limitation" in the majority of capacities rated, findings which
13 support the ALJ's final RFC. (Tr. 265-66.)

14 Plaintiff appears to argue the ALJ erred in not incorporating
15 all unrejected moderate limitations noted in Dr. Bailey's RFC
16 summary conclusions into the final RFC determination. (Ct. Rec. 14
17 at 12; Tr. 192-93.) However, the ALJ is not required to include,
18 verbatim, each limitation marked in a credited opinion. Here, the
19 opinions in Dr. Bailey's summary assessment are consistent with the
20 ALJ's final RFC determination and were duly noted in his decision.
21 (Tr. 25.) Further, independent review shows the ALJ's final RFC
22 findings reflect accurately Dr. Bailey's narrative functional
23 capacity assessment, which elaborates on "the summary conclusions"
24 of the checkbox form. (Tr. 23, 194.)

25 As found by Dr. Bailey, Plaintiff was able to understand and
26 remember simple, detailed instructions, work in a setting with
27 infrequent changes, and would benefit from help in planning. She
28

1 was able to concentrate and persist and could have superficial
2 contact with coworkers and the public. (Tr. 194.) The ALJ properly
3 incorporated these limitations in his RFC and step five findings
4 when he concluded Plaintiff could do a wide range of unskilled
5 medium work with non-exertional limitations related to impaired
6 hearing and superficial contact with the public and co-workers.
7 Referencing SSR 83-10, he found her non-exertional limitations would
8 not significantly erode her occupational base.³ (Tr. 23, 26.) The
9 ALJ's RFC findings represent a rational interpretation of the record
10 in its entirety and will not be disturbed.

11 CONCLUSION

12 The Commissioner's determination of non-disability is supported
13 by substantial evidence and free of legal error. Accordingly,

14 IT IS ORDERED:

15 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
16 **DENIED;**

17 ³ "Unskilled work" involves simple duties that can be learned
18 on the job and require little or no judgment. 20 C.F.R. § 416.968;
19 *Terry v. Sullivan*, 903 F.2d 1273, 1276-77 (9th Cir. 1990). The
20 Medical-Vocational Guidelines take notice of about 2,500 medium,
21 light and sedentary unskilled jobs. Where non-exertional
22 limitations would not significantly erode an occupational base,
23 application of the Medical-Vocational Guidelines is appropriate.
24 *Desrosiers v. Secretary of Health and Human Serv's*, 846 F.2d 573,
25 577 (9th Cir. 1988) ("non-exertional limitations do not automatically
26 preclude applications of the grids"); *Razey v. Heckler*, 785 F.2d
27 1426, 1430 (9th Cir. 1986); SSR 83-10.
28

The District Court Executive is directed to file this Order and provide a copy to counsel for Plaintiff and Defendant. Judgment shall be entered for Defendant, and the file shall be **CLOSED**.

DATED November 23, 2010.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE